

**Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C.**

In the Matter of

Embarq Local Operating Companies
Section 63.71 Application to Discontinue
Expanded Interconnection Service Through
Physical Collocation

WC Docket No. 08-145
Comp. Pol. File No. 874

Comments of Kentucky Data Link, Inc.

Kentucky Data Link, Inc. ("KDL") hereby files these comments in response to Embarq's application to discontinue its interstate tariff for physical collocation pursuant to Section 214 of the Communications Act and Section 63.71 of the Commission's rules, 47 C.F.R. § 63.71.¹ In order to preserve competition, the Commission should not permit Embarq to discontinue physical collocation unless (1) the Commission requires Embarq to permit telecommunications carriers that currently purchase physical collocation under Embarq's expanded interconnection tariff, including specifically KDL, to transition those services to a Section 251(c)(6) collocation arrangement, and (2) the Commission requires Embarq to continue to provide physical collocation on the same rates, terms and conditions, including the ability to augment those collocation arrangements, where space is available, for 'grandfathered' customers, including specifically KDL, after the effective date of discontinuance and until such time as those services are transitioned to a Section 251(c)(6) collocation arrangement.

¹ See Embarq Local Operating Companies Section 63.71 Application to Discontinue Expanded Interconnection Service Through Physical Collocation, WC Docket No. 08-145 (filed May 29, 2008) ("Embarq Application"); see also Embarq Amendment to Section 63.71 Application, WC Docket No. 08-145 (filed June 27, 2008); Comments Invited on Application of Embarq Florida, Inc., et al., to Discontinue Domestic Telecommunications Services, Public Notice, DA 08-1699, WC Docket No. 08-145 (rel. July 18, 2008).

Embarq's application seeks the withdrawal of the physical collocation portions of its FCC expanded interconnection tariff provisions offering physical collocation, which it current offers in its operating areas in Florida, Indiana, Missouri, Nevada, New Jersey, North Carolina, Ohio, Pennsylvania, Tennessee and Virginia. To prevent harm to customers, Embarq asserts that it will "grandfather" existing customers so that they remain in service under the federal tariff, and that its qualified telecommunications carrier customers will be able to obtain the physical collocation arrangements through interconnection agreements.²

Although not made clear in its application, however, Embarq apparently plans not to permit all telecommunications carriers to transition physical collocation arrangements to interconnection agreements. KDL has specifically requested that Embarq permit KDL to migrate its tariff-based collocations to Section 251(c)(6) arrangements. Embarq declined to permit KDL to do so even though KDL is a certificated CLEC, has interconnection agreements with Embarq throughout Embarq's operating territories, and KDL's customers specifically use KDL's physical collocations to interconnect and exchange their own traffic with Embarq. There is no basis in Section 251(c)(6) or the Commission's rules for denying physical collocation to any requesting carrier, especially carriers such as KDL that provide competitive interoffice transport services to other interconnecting carriers.

If the Commission allows Embarq to withdraw its federal physical collocation tariff, the Commission should preserve its pro-competition policies by imposing two conditions. First, Embarq must be required to permit any requesting carrier, including specifically KDL, to transition services purchased from Embarq's federal tariff to a Section 251(c)(6) physical collocation arrangement. Converting these tariffed arrangements to Section 251(c)(6)

² See Embarq Application at 1.

arrangements permits all requesting telecommunications carriers to use the Act's physical collocation provisions, as the Act and the Commission envisioned.

Second, the Commission should clarify that grandfathering of physical collocation arrangements as outlined in Embarq's application means that the same rates, terms and conditions will apply in the future as they did prior to the effective date of discontinuance, and that augments will be permitted at least until the services can transition to Section 251(c)(6) arrangements. Without this clarification, grandfathering existing customers does not constitute a reasonable substitute, as there is no assurance as to what the arrangements will be. Competing carriers will have no assurance that they will be able to augment their facilities by provisioning additional space, subject to well established procedures to determine space availability, during the transition to Section 251(c)(6) arrangements.

I. Background

KDL operates a fiber optic network that spans nearly 25,000 miles over 23 states. KDL serves small and medium-sized businesses in the Midwest, mid-Atlantic, South and Southeast United States. Competitive local exchange carriers, interexchange carriers, wireless providers and VoIP carriers utilize KDL's services to provide telecommunications services to residential and business customers, government entities, schools, libraries and medical facilities.

KDL is a certified competitive local exchange carrier. KDL has obtained and signed Embarq's standard interconnection agreements throughout its service area, including specifically all states in which KDL purchases physical collocation from Embarq under Embarq's federal tariff.³ Because KDL's current collocation arrangements were ordered prior to any

³ With the exception of Missouri, where KDL already had an interconnection agreement with Embarq, KDL executed these interconnection agreements in July 2008, after brief

interconnection agreements being in place with Embarq, those services are provisioned under the terms and conditions of Embarq's federal expanded interconnection tariff, rather than under KDL's interconnection agreements.

KDL utilizes Embarq's expanded interconnection tariff to purchase physical collocation. It currently has 18 physical collocation arrangements, with three applications pending, throughout Embarq's service territory.⁴ KDL uses these collocations to terminate its competitive transport facilities, from which KDL's carrier customers then interconnect with and purchase other services from, Embarq. This highly efficient arrangement lowers the interconnection costs of KDL's customers, who do not have to establish their own collocation arrangements, consistent with the Commission's rulings in its *Expanded Interconnection Tariff Investigation Order*.⁵

Expanded interconnection – and particularly physical collocation – has played an important role in expanding telecommunications competition. In its Expanded Interconnection proceedings, the Commission concluded that collocation of circuit terminating equipment with the ILEC's central office serves the public interest.⁶ Specifically, the Commission found that

negotiations with Embarq. KDL has not yet received back fully executed copies of these July 2008 agreements from Embarq.

⁴ In some instances, these collocations were initially procured by an affiliate of KDL's, Cinergy Communications Company or Cinergy's predecessor LDM. KDL recently acquired certain assets from Cinergy and has submitted augment applications to transfer the collocations from Cinergy to KDL. Some other collocations were initially procured by Cinergy Telecommunications Networks – Ohio, Inc., which was merged into KDL. All of these collocations are included within the KDL collocations throughout these comments.

⁵ *Local Exchange Carriers' Rates, Terms and Conditions for Expanded Interconnection through Physical Collocation for Special Access and Switched Transport*, Second Report and Order, 12 FCC Rcd 18730, 18885 ¶ 381 (1997) (“*Expanded Interconnection Tariff Investigation Order*”) (the Commission expressly required ILECs to accept LOAs from carriers that were not themselves collocators in order to allow those carriers to interconnect using a collocator's facilities).

⁶ See *In the Matter of Expanded Interconnection with Local Telephone Company Facilities*, CC Docket No. 91-141, Memorandum Opinion and Order, FCC 94-190, 9 FCC Rcd at 5154, 5166 ¶ 32 (1994) (“*Expanded Interconnection Remand Order*”).

dedicated network equipment in the central office allows carriers to provide transmission facilities to gain access to traffic aggregated at the central office and, thereby, fosters competition in the provision of such transmission facilities. Indeed, Congress itself viewed physical collocation as so important that it enacted Section 251(c)(6) specifically to overturn an earlier decision of the United States Court of Appeals for the D.C. Circuit prohibiting the FCC from mandating physical collocation.⁷

In the *Expanded Interconnection Remand Order*, the Commission cautioned that:

A LEC that has chosen to provide physical collocation in particular central offices will not be permitted to withdraw its physical collocation offering for customer's existing collocation nodes at those offices, for either current or new circuits, without Commission certification that such discontinuation of service will not adversely affect the present or future public convenience and necessity.⁸

In considering a discontinuance request, the Commission considers a number of factors in balancing the interests of the carrier and the affected user community:

(1) the financial impact on the common carrier of continuing to provide the service; (2) the need for the service in general; (3) the need for the particular facilities in question; (4) the existence, availability, and adequacy of alternatives; and (5) increased charges for alternative services. . . .⁹

The key point of this inquiry is the adequacy of substitute service. As the Petitioner, Embarq has the burden to demonstrate that grant of its application will not adversely affect the present interest of the carrier customers to which service is currently offered, including competitors.

⁷ See *Bell Atlantic v. FCC*, 24 F.3d 1441 (D.C. Cir. 1994).

⁸ *Expanded Interconnection Remand Order*, 9 FCC Rcd at 5166 ¶ 32.

⁹ *Verizon Telephone Companies; Section 63.71 Application to Discontinue Expanded Interconnection Service Through Physical Collocation*, 18 FCC Rcd 22737 ¶ 8 (2003) ("*Verizon Physical Collocation Discontinuance Order*").

II. As a Condition of Discontinuance, the Commission Should Require Embarq to Transition KDL's Physical Collocations Under the Federal Tariff to a Section 251(c)(6) Collocation Arrangement

In its application, Embarq proposes that in the future, carriers be limited to purchasing physical collocation arrangements pursuant to Section 251(c)(6) and that such services should only be available pursuant to an interconnection agreement. To demonstrate that reasonable alternatives are available, Embarq relies in significant part on the fact that “physical collocation is available pursuant to Section 251(c)(6) (47 U.S.C. §251(c)(6)) to carriers that are interconnecting with the ILEC’s network for the transmission and routing of telephone exchange and exchange access service or for the purpose of accessing the ILEC’s unbundled network elements.”¹⁰ What Embarq does not tell the Commission is that it will not permit all requesting telecommunications carriers to obtain physical collocation pursuant to Section 251(c)(6). As a condition of approval of the discontinuance request, the Commission should hold Embarq to its promise and make clear, as a condition of the discontinuance, that Embarq must convert KDL’s existing services to a Section 251(c)(6) collocation arrangement pursuant to the Parties’ interconnection agreements.

Nothing in Section 251(c)(6) or the Commission’s rules allows Embarq to restrict the telecommunications carriers that may request physical collocation. Section 251(c)(6) requires the incumbent LEC to provide for “physical collocation of equipment necessary for interconnection or access to unbundled network elements.”¹¹ Furthermore, the plain language of 47 C.F.R. § 51.323(a) directs “an incumbent LEC shall provide physical collocation and virtual collocation to requesting telecommunications carriers” without any limitation.¹²

¹⁰ Embarq Application at 1, n.2.

¹¹ 47 U.S.C. § 251(c)(6).

¹² 47 C.F.R. § 51.323(a).

KDL is a certified competitive local exchange carrier and has executed interconnection agreements with Embarq throughout its service area. Its customers use KDL's facilities to interconnect with Embarq or to access its unbundled network elements. Accordingly, there is no reason why Embarq cannot transition KDL's physical collocation arrangements from its federal expanded interconnection tariffs to a 251(c)(6) collocation arrangement.

This is the same result the Commission reached in its 1997 *Expanded Interconnection Tariff Investigation Order*. In that Order, the Commission rejected ILEC attempts to refuse to permit expanded interconnect carriers to submit Letters of Agency for cross-connects to be ordered by and billed directly to their carrier customers. The Commission expressly found "that permitting the use of LOAs will allow interconnectors to compete more efficiently with [incumbent] LECs because LOAs allow interconnectors to lower their costs by eliminating duplicative administrative functions."¹³ It also found refusals to permit interconnectors to obtain LOAs from their customers so that their customers could directly order access services was unreasonably discriminatory.¹⁴

Adopting this proposed condition in no way harms Embarq. KDL would obtain physical collocation under the Section 251(c)(6) rates, terms and conditions that Embarq says would apply to all carriers on a going-forward basis. Therefore, the Commission should require Embarq to transition KDL's services to 251(c)(6) collocation arrangements in states where KDL has interconnection agreements with Embarq.

¹³ *Expanded Interconnection Tariff Investigation Order*, 12 FCC Rcd at 18885 ¶ 381.

¹⁴ *See id.*

III. Embarq Should Be Required to Provide Augments to Its Existing Physical Collocation Customers Until Such Time as Those Services Can Be Transitioned to an Interconnection Agreement

Although Embarq has stated in its application that it “will ‘grandfather’ existing physical expanded interconnection arrangements so that those existing customers can remain in service under the federal tariff,”¹⁵ it provides no assurances that it will not change those rates, terms and conditions, nor does it make clear whether a grandfathered customer may augment its collocations if space is available. The Commission should clarify that Embarq must, at a minimum, allow its existing physical collocation customers to obtain augments – both in terms of additional power and cross-connects for additional connections to the present equipment and additional common space, if available, to add equipment at a current site – and that Embarq must also maintain existing rates, terms and conditions.¹⁶

Embarq’s proposal to “grandfather” current collocation arrangements is functionally meaningless unless Embarq agrees to continue to provide carriers the ability to augment its facilities including the ability to order additional racks within its common space. To avoid undue disruption in the telecommunications marketplace, the Commission should ensure that Embarq’s

¹⁵ Embarq Application at 2.

¹⁶ Recently, Embarq has taken the position that its tariff only permits a carrier ordering some other access service from it to purchase expanded interconnection in the form of collocation, and thus it has threatened to terminate KDL’s expanded interconnection. Nothing in the Commission’s expanded interconnection rules permits Embarq to impose such a restriction. Under the expanded interconnection rules, expanded interconnection is available to any party, who need not even be a carrier. *See* 47 C.F.R. § 64.1402(a). Nothing in the rules says that the party purchasing expanded interconnection to terminate its fiber at a collocation site, and the party purchasing a cross-connect from that site to the ILEC’s network must be the same party. In fact, the Commission expressly allowed those to be different parties when it permitted the use of LOAs for parties that were not collocators (i.e., “Interconnectors” under the rule), in order to purchase and be billed for cross-connects and other access services. *See Expanded Interconnection Tariff Investigation Order*, 12 FCC Rcd at 18885 ¶ 381. In addition, Embarq’s tariff contains no clearly stated restriction on physical collocation, and thus must be construed against Embarq. *See The Associated Press Request for Declaratory Ruling*, Memorandum Opinion and Order, 72 FCC 2d 760, 764 ¶ 11 (1979).

assurances that physical collocation arrangements pursuant to federal tariff will not be “grandfathered” in name only and that each and every one of the supporting services necessary to maintain existing federal physical collocation arrangements will continue to be available, at the same rates, terms and conditions as prior to discontinuance.

The ability to augment is critical to KDL and its ability to serve its customers. Without this ability, KDL would operate in an uncertain environment with very real risks to its business. Embarq’s “grandfathering” proposal will do absolutely nothing to avoid disruption without express assurances of its carrier customers’ ability to augment its facilities and to acquire additional common space.

Moreover, Embarq does not demonstrate that it has suffered, or will suffer, any financial or economic hardship if it is required to continue to provide KDL and other carrier customers the ability to augment and access to additional space after the effective date of discontinuance or during any transition period to a 251(c)(6) arrangement. The Commission must make clear that Embarq’s commitment to grandfather services will not adversely affect the public convenience and necessity. This would parallel what the Commission required in the *Verizon Physical Collocation Discontinuance Order*. In that Order, the Commission conditioned Verizon’s discontinuance on Verizon continuing to make available, among other things, augments on a private contract basis where the collocater was unable to use Section 251 interconnection agreements.¹⁷ Only in that circumstance was the Commission willing to find that there was a “reasonable substitute to the federally-tariffed section 201” physical collocation-related

¹⁷ See *Verizon Physical Collocation Discontinuance Order*, 18 FCC Rcd ¶¶ 22, 39.

services.¹⁸ Thus, Embarq should be required to provide augments to its grandfathered physical collocation arrangements.

Thus, at least until such time KDL can effectuate conversion of physical collocation services from Embarq's federal tariff to those available pursuant to an interconnection agreement, the Commission should require Embarq to offer a true grandfather of services. All rates currently applicable under the federal tariff should also remain applicable.

Conclusion

In its application, Embarq represents that no carrier will be harmed by the discontinuance because carriers can obtain physical collocation pursuant to Section 251(c)(6). The Commission should adopt express conditions to require Embarq to do so for all requesting telecommunications carriers, without restriction. In addition, the Commission should require Embarq to truly grandfather its existing customers, by retaining all rates, terms and conditions, including the ability to augment those physical collocation arrangements where space is available. To do otherwise would jeopardize the competition that developed in Embarq's markets.

Respectfully submitted,



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¹⁸ *Id.* ¶ 22.

Certificate of Service

I HEREBY CERTIFY that on this 18th day of August, 2008, a true and correct copy of the foregoing Comments of Kentucky Data Link, Inc., in response to Embarq's application to discontinue its interstate tariff for physical collocation, was served by overnight delivery service on the following:

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